Kathryn Ma Wai Fong v TMC Importer & Exporter Sdn Bhd

HIGH COURT (SIBU) — COMPANIES (WINDING-UP) NO SBW-28NCC-15/11 OF 2017
LIM HOCK LENG JC
22 NOVEMBER 2018

Companies and Corporations — Winding up — Just and equitable grounds — Breakdown of mutual trust and confidence — Whether petitioner must establish that respondent was quasi-partnership — Whether there was loss of mutual trust and confidence — Companies Act 2016 s 465(1)(h)

The petitioner applied for the defendant to be wound up on just and equitable grounds, pursuant to s 465(1)(h) of the Companies Act 2016. The petitioner was the executrix of the estate of Datuk Wong Kie Nai ('WKN') who together with Wong Kie Yik ('WKY') and Wong Kie Chie ('WKC') were the sons of the late Datuk Wong Tuong Kwang, the founder of the WTK Group of companies. Neil and Mimi were the children of WKN who passed away on 11 March 2013. The respondent was an investment holding company. The total paid up capital and shareholding structure of the respondent since 30 December 2000 were that, 170,000 shares each to WKY, WKC and the estate of WKN whilst WTK realty held a total of 490,000 shares which amounted to a total of 1,000,000 shares. The respondent was a family company and the mutual trust and confidence between the opposing camps had irretrievably broken down which was manifested by litigation in various countries since 2013. The opposing contributories argued that the petitioner must establish the respondent company was in substance a quasi-partnership in which there had been a loss of mutual trust and confidence before a winding up could be ordered on just and equitable grounds. It was argued that there could not be a loss of mutual trust and confidence as such a relationship was personal to the three brothers, lapsed upon the demise of WKN and could not be transmitted to the petitioner and her children.

Held, allowing the petition:

(1) The circumstances in which the just and equitable ground could be invoked were not restricted to quasi-partnerships. The mutual trust and confidence extended to the next generation. What was clear was that there were varying degrees of ownership and board representation at one time or another between the two factions comprising the petitioner and her children on the one part and WKY and WKC and their children on the other part. These factions were clearly not able to work or operate together for a common purpose (see paras 11–13).

[Bahasa Malaysia summary

Pempetisyen telah memohon agar defendan digulung atas alasan adil dan saksama, selaras dengan s 465(1)(h) Akta Syarikat 2016. Pempetisyen merupakan wasi pusaka Datuk Wong Kie Nai ('WKN') yang bersama dengan Wong Kie Yik ('WKY') dan Wong Kie Chie ('WKC') merupakan anak kepada mendiang Datuk Wong Tuong Kwang, pengasas kumpulan syarikat WTK. Neil dan Mimi merupakan anak kepada WKN yang meninggal dunia pada 11 Mac 2013. Responden merupakan syarikat induk pelaburan. Jumlah modal berbayar dan struktur pegangan saham responden sejak 30 Disember 2000 adalah seperti berikut, 170,000 saham kepada WKY, WKC dan pusaka WKN manakala WKN Realty memegang sejumlah 490,000 saham yang mana menjumlahkan kesemuanya kepada 1,000,000 saham. Responden merupakan syarikat keluarga dan kepercayaan dan keyakinan bersama diantara pihak bertentangan telah gagal yang boleh dilihat dengan litigasi dalam beberapa negara sejak 2013. Penyebab bertentangan menghujahkan bahawa pempetisyen perlu membuktikan syarikat responden pada asasnya merupakan satu perkongsian-kuasi yang mana wujud kehilangan kepercayaan dan keyakinan bersama sebelum satu perintah penggulungan boleh diperintahkan atas alasan adil dan saksama. Ianya dihujahkan bahawa ianya tidak boleh wujud satu kehilangan kepercayaan dan keyakinan bersama yang sedemikian kerana perhubungan tersebut adalah peribadi kepada tiga adik beradik, yang tamat sewaktu kematian WKN dan tidak boleh dipindahkan kepada pempetisyen dan anaknya.

Diputuskan, membenarkan petisyen:

(1) Keadaan yang mana alasan adil dan saksama boleh digunakan tidak terhad kepada perkongsian-kuasi. Keyakinan dan kepercayaan bersama juga dipanjangkan kepada generasi seterusnya,. Apa yang jelas adalah wujud beberapa darjah pemilikan dan perwakilan lembaga pada sesuatu waktu diantara dua bahagian yang terdiri daripada pempetisyen dan anaknya di satu pihak dan WKY dan WKC dan anak-anak mereka di satu lagi pihak. Kumpulan-kumpulan ini adalah jelas tidak mampu untuk berkerja secara bersama untuk tujuan yang sama (lihat perenggan 11–13).]

Notes

For cases on just and equitable grounds, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1599–1604.

Cases referred to

A company (No 005685 of 1988), ex parte Schwarcz (No 2); Re [1989] BCLC 427, ChD (refd)

Ebrahimi v Westbourne Galleries Ltd and others [1972] 2 All ER 492; [1973] AC 360, HL (refd)

Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and other matters [2018] SGHC 88; [2019] 3 SLR 688, HC (distd)
Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1; [2018] 5 CLJ 513, FC (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (distd)
Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769; [1995] 1 LNS 99; [1995] 2 AMR 1033, SC (refd)
Yap Lai Seng v High-On Industries Sdn Bhd & Anor [2015] MLJU 2032; [2015] 1 LNS 1204, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) ss 181, 218(1)(i)
Companies Act 2016 s 465(1)(h)

Alvin Yong (Shirleen Ong with him) (Alvin Yong Advocates) for the petitioner
Sim Hui Chuang (Reddi & Co) for the respondent.
Stanley Eddy (Battenberg & Talma) for the contributories.

Lim Hock Leng JC:

[1] The petitioner is the widow, and executrix of the estate, of Datuk Wong Kie Nai ('WKN') who together with Wong Kie Yik ('WKY') and Wong Kie Chie ('WKC') are the sons of the late Datuk Wong Tuong Kwang, the founder of the WTK Group of Companies.

[2] Neil and Mimi are the children of WKN who passed away on 11 March 2013.

[3] The respondent is an investment holding company. Its wholly owned subsidiaries are Sing Chew Cold Storage Sdn Bhd, Sing Chew Catering Services Sdn Bhd and Interglobal Vision (Food Processing) Sdn Bhd.

[4] Since 30 December 2000, the total paid-up capital and shareholding structure of the respondent is as follows:

No.	Shareholder	Number of Shares
1.	WKY	170,000
2.	WKC	170,000
3.	Estate of WKN	170,000
4.	WTK Realty	490,000
	Total	1,000,000

[5] The board of directors comprises WKY, WKC and Patrick Wong. WKY's

daughter, Annie Wong, was appointed an alternate director on 16 March 2016.

[6] Although WKN was a director until he passed away on 11 March 2013 and his son, Neil, was a director from 2001–2004 and the immediate side of their family does not now have board representation, the respondent was wholly owned by the three brothers and WTK Realty Sdn Bhd which is the flagship family holding company, with the original subscribers and members from the Ting family no longer holding any shares as from 30 December 2000. As with the other family companies in the WTK group, there were varying degrees of shareholding and board representation. WTK Realty Sdn Bhd was wound up by Celestina Galid JC on 6 November 2017, on just and equitable grounds, having decided it to be a family company.

[7] The respondent is a family company and the mutual trust and confidence between the opposing camps has irretrievably broken down, as manifested by the litigation in various countries since 2013. Many of the actions are still ongoing.

[8] The opposing contributories argue that the petitioner must establish the respondent company is more than just a family company and is in substance a quasi-partnership in which there has been a loss of mutual trust and confidence before a winding-up can be ordered on just and equitable grounds.

[9] They argue that there cannot be a loss of mutual trust and confidence as such a relationship was personal to the three brothers, lapsed upon the demise of WKN and could not be transmitted to the petitioner and her children.

[10] However, as highlighted by learned counsel for the petitioner, relying on the decision of Gibson J in *Re a company (No 005685 of 1988), ex parte Schwarcz (No 2)* [1989] BCLC 427 at p 438, *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492; [1973] AC 360 and *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1 at p 23; [2018] 5 CLJ 513 at p 536, the court's jurisdiction to wind up a company on the just and equitable grounds is not confined to quasi-partnerships and the jurisdiction is not limited by pre conditions or the usual elements of an association based on personal relationship or an understanding that some or all of the shareholders may participate in the conduct of the business.

[11] The circumstances in which the just and equitable ground can be invoked are clearly not restricted to quasi-partnerships or even any of the circumstances referred to by Lord Wilberforce, as held by the Federal Court in *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf*

of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1 at p 23; [2018] 5 CLJ 513 at p 536:

> It is noted that these elements are non-essential, and are not to be interpreted as preconditions before the just and equitable clause can be relied upon: *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769 at p 776

[12] To recapitulate, the respondent has a paid up capital of 1,000,000 shares. Each of the three brothers had equal shares of 170,000 each (510,000 shares) and WTK Realty Sdn Bhd, the flagship family holding company, held the balance of 490,000 shares. The contention of the opposing contributories that Neil and Mimi did not play an active part in its management does not alter the fact that the respondent is a family company or that the mutual trust and confidence between the opposing camps has irretrievably broken down, as manifested by the litigation in various countries since 2013. Many of the actions are still ongoing.

[13] The decision of the Singapore High Court in *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and other matters* [2018] SGHC 88; [2019] 3 SLR 688 can be distinguished, as the mutual trust and confidence extended to the next generation, with Neil having served on the board, albeit for a period of two years or so and with Patrick having been appointed a director since 1 September 1999. What is clear is that there were varying degrees of ownership and board representation at one time or another between the two factions comprising the petitioner and her children on the one part and WKY and WKC and their children on the other part. These factions are clearly not able to work or operate together for a common purpose. Given that scenario, it does not matter that there was no functional family relationship with Kathryn Ma to begin with, as argued by learned counsel for the contributories.

[14] As for the respondent's contention that there was inordinate delay in presenting the winding-up petition in November 2017 (about four and a half years from the time that the litigation started between the two family factions, after WKN had passed away on 11 March 2013), it is not fatal as there were multiple suits filed in different jurisdictions progressively while there were also efforts at mediation.

[15] The case of *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326, which was relied upon by the respondent, may be distinguished. To begin with, the petition in that case was filed pursuant to s 181 of the Companies Act 1965 and it was only during the course of argument that the counsel for the petitioner sought to rely on the just and equitable ground under s 218(1)(i). Edgar Joseph Jr J (as he then was) held that the allegation of the company purchasing old stock at exorbitant prices 'was wholly unsubstantiated' and even if it were otherwise, such failure was outside the scope of s 181 and further held that

there was no evidence that the company was conducting business that was fraudulent or beyond what was authorised. Importantly, although the investment of substantial sums was a matter for serious criticism, the petitioners there took their share of the profits resulting therefrom and were held to have acquiesced in those investments. It was held that they could not blow hot and cold. In the case at hand, the petitioner can hardly be said to have acquiesced or agreed to the continuing and growing acrimony between the two family factions which was being played out progressively in a spate of legal proceedings in different jurisdictions. Further, in *Senson*, the petitioners in that case had the alternative recourse to the 'rescission of all those shares allotted to the petitioners on April 30, 1986, and repayment of $25,381 paid therefore' under their s 181 petition.

[16] On the contentions relating to the unsuccessful mediation and a buy-out, the 'Courts in Malaysia are not obliged to consider the availability of alternative remedies before making a winding-up order under s 218(1)(i) of the CA: *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769; [1995] 1 LNS 99; [1995] 2 AMR 1033.'. See *Yap Lai Seng v High-On Industries Sdn Bhd & Anor* [2015] MLJU 2032; [2015] 1 LNS 1204.

[17] Although the contributories argue that the respondent is an investment holding company and does not generate revenue or income, it does not alter the fact that the respondent has been running at a loss since 2012 and there is no evidence of any turnaround plan or any action taken by its board to improve its finances. The irretrievable breakdown in the trust and confidence between the feuding factions make it unlikely that the company can move forward with a common purpose.

[18] As for the appointment of the liquidator, taking into account the increased costs of liquidation, distance and convenience, it would be more appropriate to appoint Mr Wong Ching Yong, a Sarawakian based in Sibu, to be the liquidator, more so as Ismail Brahim JC (who had appointed Mr Lim San Peen to be the liquidator of Arctic Star Sdn Bhd) had accepted that Mr Wong is equally qualified and experienced. Mr Lim San Peen, on the other hand, is based in West Malaysia while the respondent company, its bank accounts, business, creditors, suppliers, and others having dealings with it are based in Sibu. While there are concerns over Mr Lim's independence and impartiality, which this court is not called upon to decide, there is also the concern which has since emerged that legal costs appear to have been unnecessarily incurred by Mr Lim in relation to Arctic Star Sdn Bhd, as set out in the affidavit of WKY on 22 March 2018. Moreover, Supang Lian J had considered the costs of liquidation in appointing Mr Wong Ching Yong as the liquidator for Jumbo Logging Sdn Bhd, Sentiaya Sdn Bhd, Lormalong Sdn

Bhd, Master Ace Territory Sdn Bhd, Harvard Rank Sdn Bhd and Stratum Mining Sdn Bhd.

[19] It is ordered that the respondent be wound up pursuant to s 465(1)(h) of the Companies Act 2016, that Mr Wong Ching Yong be appointed the liquidator of the respondent and that the costs of this petition be paid out of the assets of the respondent.

Petition allowed.

Reported by Izzat Fauzan